IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

MICHELE MARCHESE,

Petitioner,

vs.

UNITED STATES OF AMERICA AND PRESTON SMITH, WARDEN OF THE UNITED STATES CORRECTIONAL INSTITUTION AT TERMINAL ISLAND, CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Dismissing Petition for Writ of Habeas Corpus Sought to Be Reviewed.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Dismissing Petition for Writ of Habeas Corpus Sought to Be Reviewed.

Petitioner Michele Marchese respectfully petitions for a writ of Certiorari to review the judgment or order made by the United States District Court, Southern District of California, Central Division and the judgnent of affirmation in Ninth Circuit Court of Appeals. A copy of the Return to the Petition for a Writ of Habeas Corpus and a copy of the order to the United States District Court are attached hereto in the appendix as "A" and "B". The opinion of the Ninth Circuit is as yet unreported, but a copy is attached hereto in the appendix marked "C" and is hereby referred to.

The petitioner was convicted of ten counts of the Indictment charging conspiracy and violation of the narcotics laws of the United States involving three sales and his co-defendant Jesse Del Bono was convicted of four counts in the said United States District Court, Southern District of California, Central Division on June 16, 1958.

On April 15, 1958 the Ninth Circuit Court of Appeals affirmed the judgment of conviction without opinion or decision on appeal and on June 29, 1959 the petition for certiorari was denied by the United States Supreme Court also without opinion.

A motion was made under Section 2255 of Title 28 U. S. C. in said District Court to annul vacate and set aside the judgment of conviction in case of *Marchese v. United States of America,* No. 1300-60-T.C., and the same was denied on December 22, 1960 and a petition for rehearing and reconsideration of an amended and renewal motion was made and denied by said Court of March 15, 1960. The time for appeal was permitted to lapse.

A petition for a writ of habeas corpus was filed by petitioner in said District Court on June 20, 1961 in this case and on the 29th day of June 1961, the said petition was dismissed *ex parte* without a hearing and the judgment or order of dismissal was affirmed by the Ninth Circuit Court of Appeals on May 31, 1962 and a petition for rehearing was denied on July 12, 1962.

At no stage of the proceedings in this case or in the case in which petitioner was convicted has there ever been a decision or opinion on the merits on any of the grounds urged. In this case the opinion of the Circuit Court only covered the question as to the jurisdiction of the District Court and did not pass upon the questions involved as to the violation of petitioner's constitutional rights.

Jurisdiction is conferred by Title 28, Section 1254(1) U. S. Code to review the judgment in question.

Statutes Involved.

Title 28, Sec. 2255 U. S. C. provides in part as follows:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial of infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

United States Constitution, Part I, Section 9, Clause 2 which provides:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Fourth Amendment to U. S. Constitution;

Fifth Amendement to U. S. Constitution;

Fourteenth Amendment to U. S. Constitution;

Title 28, U. S. C. Sec. 2241(a);

Title 28, U. S. C., Sec. 2243;

Title 47, U. S. C. Sec. 605.

QUESTIONS PRESENTED.

I.

Questions Presented in Petition for Writ of Habeas Corpus Not Passed Upon by United States District Court or United States Circuit Court.

(a) The judgment of conviction by the use of "silver platter" evidence is in violation of the Due Process of Law clause of the Constitution of the United States;

(b) Sussman's entire course of behavior from January 29, to March 23, is susceptible of only one reasonable interpretation and that was that there was between himself and Federal and State authorities an agreement to entrap the petitioner, in exchange for money, narcotics, favoritism and leniency for himself. Such course of conduct and subsequent testimony, over objections, denied the petitioner a fair and impartial trial, guaranteed him under the Fifth Amendment of the United States Constitution;

(c) During the petitioner's trial, the United States Attorney abused the privileges of his office by knowingly participating in the suppression of the truth and failing to disclose the truth concerning the obvious agreement or understanding between Donald Sussman and the Federal and State authorities, in disregard of the petitioner's constitutional rights under the Fifth Amendment, to the end he was denied a fair trial.

(d) The use of evidence obtained by the electronic recording device, known as the Schmidt Transmitter, was unlawful and violative of the Fourth Amendment of the Constitution, and hence cannot support the judgment of conviction;

(e) The arrest of the petitioner without a warrant of arrest, the search of his person and of his apartment or residence, the search of the automobile driven by the defendant Del Bono, as well as the searches made at other places without a search warrant, were all in violation of the Fourth Amendment;

(f) The evidence obtained by an unauthorized interception of a telephone conversation is in violation of Title 47, U. S. C. A., Section 605, as well as in violation of the Fifth Amendment to the Constitution.

II.

Questions Presented Other Than Those Involved in the Merits of the Petition for Writ of Habeas Corpus.

(a) That portion of Section 2255 of Title 28 U. S. C. wherein the right to petition for a writ of habeas corpus is prohibited or restricted is unconstitutional and in violation of Section 9, Clause 2 of the U. S. Constitution.

(b) The Court erred in the denial and dismissal of the petition for lack of jurisdiction without a hearing on the merits, and this denied petitioner due process of law in violation of the Fourteenth Amendment of the Constitution.

(c) If the petition be considered as a motion under Title 28, Section 225 U. S. C., the Circuit Court erred in holding that the petition was defective in that petitioner did not allege why he was unable or failed previously to assert new grounds raised in the petition or why he had previously been unaware of the significance of relevant facts.

(d). The Circuit Court erred in holding that decisions of the Supreme Court subsequent to the original motion under Title 28, Section 225 cannot be considered under a writ of habeas corpus even though constitutional rights of petitioner are involved.

Brief Statement of Facts.

We shall only briefly summarize the facts as they are set forth in detail in the petition for the writ of habeas corpus the record of which the Court will have. [See C. T. 5-11 incl.]* Since the Government in its return to the writ did not deny the statement of facts set forth in the petition, such facts must be assumed to be true.

White v. Regan, 324 U. S. 760.

Sussman, a dope peddler and addict convicted under the laws of California and on probation was indicted and arrested for violation of the narcotics laws of the United States. [C. T. 5, 6.] He was induced by the Federal and State narcotics agents to trap and secure the conviction of petitioner. During the six weeks of investigation prior to petitioner's arrest, Sussman was employed by the Federal Narcotics Bureau as a "special employee" and paid $600.00 [C. T. 6] with the knowledge and acquiescence of the agents during the investigation he was obtaining and using heroin "off the top" to satisfy his habit which was costing about $75.00 a day. [C. T. 6, 9.] While he was working with the agents he was taking shots every four or five hours and was continuously under the influence of narcotics and this was known to the agents. [C. T. 6, 9.]

*References to C. T. mean Clerk's Transcript in which is set forth the Petition for Writ of Habeas Corpus.

Sussman had been befriended by petitioner and had been a visitor in the latter's residence for several years. Petitioner had assisted Sussman financially and had tried to have him cured of his addiction [C. T. 6], using friendship as a means of entry, Sussman on three occasions entered Marchese's apartment with an electronic transmitting device known as a Schmidt transmitter, concealed on his person unknown to Marchese. [C. T. 7, 9.] The agents purportedly listened in on these conversations while stationed a block or two away. There was a conflict as to whether the conversations were recorded but at the trial the agent and Los Angeles Deputy Sheriff were permitted to testify as to the conversations overheard despite objections on the part of petitioner. [C. T. 8, 9.] No recordings were produced and although Sussman testified he approved the recording, the agents denied that recordings were made. [C. T. 7-10 incl.]

Although Sussman was given $1000.00 in marked money to purchase narcotics, no marked money was ever found in Marchese's possession, nor was any narcotic ever found in his possession. [C. T. 7-8.]

On the day of the arrest on March 13, 1958, even though Marchese and his co-defendant Del Bono had been under close surveillance by agents for six weeks, the agents entered Marchese's apartment with guns, arresting him and making a thorough search of the apartment without a search warrant but found no narcotics. [C. T. 8-9.] They, also about an hour prior to the ar-

rest, caused an auto driven by Del Bono to be searched without a search warrant and found a quantity of heroin. [C. T. 8.] This car was parked at the Charles Restaurant over a mile distant from Marchese's apartment. Objection was made by Marchese to the introduction of such evidence against him. [C. T. 10.]

During the investigation Agent Richards caused Sussman to call Marchese on the telephone and purportedly listened to the conversation with his ear close to the receiver. [C. T. 7-10.] Although he never heard Marchese speak in person until the day of the arrest, he incredibly testified he recognized Marchese's voice even though distorted by the Schmidt transmitter and even though he did not have the telephone receiver at his ear but only close to it while Sussman was holding it to his own ear. [C. T. 10, 11.]

At the trial, Sussman testified that no agreement or promise of leniency was given to him for cooperating with the agents. Federal Agent Richards, who was in charge of the investigation, testified he never heard of any promise of a lighter sentence made to Sussman if he would cooperate with the agents. [C. T. 21-22.] At that very time Sussman had already received the benefit of his cooperation, the full extent of which was not then known to Marchese or his attorneys. His indictment under Section 174 of Title 21 U. S. C. had been dismissed and he was charged under a different section and given a sentence of only two years *instead of a sentence of twenty years.* His violation of proba-

tion for a previous narcotics conviction under the California law was also terminated and he was given a sentence of one year to run concurrently with the Federal two year sentence. [C. T. 9, 10, 20, 21.]

The Deputy U. S. Attorney not only stood by while false testimony was knowingly given, by Sussman and Richards, but by objection suppressed any evidence relating to promises or agreements of leniency for Sussman. [C. T. 10, 11, 21, 22, 24.]

The facts set forth in the petition for the Writ of Habeas Corpus and referred to above show that the Federal agents conspired with Sussman to violate the law and acquiesced in his violation of the narcotics laws in order to obtain his cooperation and undoubtedly colored and perjured testimony in what we have referred to the petition as a "devil's bargain" between them. Reference is made to the petition for a more detailed statement of facts which were not denied by the respondent United States. [C. T. 5-11 incl., 20-22.]

ARGUMENT.

The six questions involved in the Petition for the Writ of Habeas Corpus were exhaustively discussed in the Petition and so we refer to the same as set forth on pages 13 to 42 inclusive of the Clerk's Transcript below, transmitted to this Court. We shall therefore, very briefly refer to such questions or points herein.

POINT I(a).

The Judgment of Conviction by the Use of "Silver Platter" Evidence Is in Violation of the Due Process of Law Clause of the Constitution of the United States [Discussion C. T. 13-15.]

The Federal agents conspired unlawfully with the state officer to obtain evidence they were unable to obtain lawfully and they are prohibited from using such evidence.

Rea v. U. S., 350 U. S. 214;
Elkins v. U. S., 364 U. S. 206.

A Federal agent (regular or special or informer) when obtaining evidence for a Federal prosecution must obey Federal rules of criminal procedure relating to search and seizure.

Rea v. U. S., 350 U. S. 214.

POINT I(b).

Sussman's Entire Course of Behavior From January 29, to March 23, 1958, Is Susceptible of Only One Reasonable Interpretation, and That Was That There Was an Agreement Between Himself and Federal and State Authorities to Entrap the Petitioner, in Exchange for Money, Narcotics, Favoritism and Leniency for Himself. Such Course of Conduct and Subsequent Testimony, Over Objections, Denied the Petitioner a Fair and Impartial Trial Guaranteed to Him Under the Fifth Amendment of the United States Constitution [Discussion C. T. 16-19].

The Federal agents used a convicted dope peddler, a narcotics addict, a probation violator, under Federal indictment for sale of narcotics to secure the arrest and conviction of petitioner, supplied him with money, freedom for a while and leniency of sentence and condoned his use of narcotics in violation of State and Federal Narcotics laws and other laws.

This type of law enforcement is violative of public policy of the United States.

In *Sherman v. U. S.*, 356 U. S. 369 at page 380, Mr. Justice Douglas quotes from the dissenting opinion of Mr. Justice Holmes in *Olmstead v. United States*, 277 U. S. 438, as follows:

> "It is also desirable that the Government should not itself foster and pay for other crimes when they are the means by which evidence is to be obtained."

POINT I(c).

During the Petitioner's Trial, the United States Attorney Abused the Privileges of His Office by Knowingly Participating in the Suppression of the Truth and Failing to Disclose the Truth Concerning the Obvious Agreement or Understanding Between Donald Sussman and the Federal and State Authorities, in Disregard of the Petitioner's Constitutional Rights Under the Fifth Amendment; to the End He Was Denied a Fair Trial [Discussion C. T. 20-24].

As pointed out in the summary of facts, there was evidence in the original record tending to show that an agreement or arrangement was made with Sussman, for his cooperation to give him leniency in the Federal prosecution as well as to relieve him of the serious consequence of his violation of probation under a state sentence. Yet the U. S. Attorney stood idly by while Sussman and Federal Agent Richards in charge of the investigation denied any arrangement, and made no objection to such obviously false testimony. In fact, by objection, to questions asked by defense counsel, the U. S. Attorney even suppressed evidence of any such arrangements.

In the case of *Napue v. Illinois*, 360 U. S. 264, the Supreme Court vigorously condemned such conduct on the part of the prosecutor and reversed the conviction of the prisoner therefor, holding that he did not have a fair trial.

POINT I(d).

The Use of Evidence Obtained by the Electronic Recording Device Known as the Schmidt Transmitter Was Unlawful and Violative of the Fourth Amendment of the Constitution, and Hence Cannot Support the Judgment of Conviction [Discussion C. T. 24-35].

In this case evidence was introduced over objection of the defendant Marchese of conversations purportedly taking place in Marchese's apartment between him and Sussman, obtained by the use of the electronic device known as the Schmidt Transmitter, concealed on the person of Sussman, unknown by Marchese.

We are not unmindful of the decision of this Court in the case of *On Lee v. U. S.*, 343 U. S. 747. A distinction should be drawn between that case and the case at bar. In the *On Lee* case the agent with the concealed device entered On Lee's laundry shop where the public was invited. Also part of the conversation obtained through the device took place on the sidewalks of New York. Both places were, therefore, public places. Even the solicitor general in his brief page 29 commenting on the dissenting opinion of Judge Frank in the U. S. Circuit Court, stated:

> "The various situations envisaged in the dissenting opinion where mechanical contrivances are used to publish conversations within a private home are unrelated to the present case. As has been observed above a private home is not involved; the conversation transpired is a place to which the public was invited."

In the present case, the purported conversation took place in Marchese's private apartment or residence, to which Sussman gained access by reason of his friendship and acquaintance with Marchese.

A like distinction was made in the case of *Order of Fraternal Eagles v. U. S.*, 57 F. 2d 93, between private homes and public places.

Doubt has been thrown on the holding of the majority in the *On Lee* (5 to 4) by the decision in the case of *Silverman v. United States*, 365 U. S. 505, where the introduction of a spike attached to a microphone, which penetrated only inches into the walls of the apartment of the defenant, was held violative of the prisoner's constitutional rights of freedom from illegal searches and seizures. The footnote No. 4 quoted with approval from the dissenting opinion of Judge Frank in the *On Lee* case.

Moreover, although the Supreme Court in the *Silverman* case stated that it declined to go beyond the case of *Goldman v. U. S.*, 316 U. S. 129, it did not make such a statement with reference to the *On Lee* case, and such omission and the concurring opinions of other justices raise an implication that the Court might re-examine its decision in the *On Lee* case and hold that the use of a electronics device introduced into private premises by concealment on the person of a visitor or invitee would violate constitutional rights.

POINT I(e).

The Arrest of the Petitioner Without a Warrant of Arrest, the Search of His Person and of His Apartment or Residence, the Search of the Automobile Driven by the Defendant Del Bono, as Well as the Searches Made at Other Places Without a Search Warrant, Were All in Violation of the Fourth Amendment [Discussion C. T. 36-39].

Petitioner was under constant surveillance for several weeks before his arrest, and the officers had ample time to secure a search warrant, but failed to do so. The invasion of his apartment and search thereof although nothing illegal was found, violated his constitutional rights. Likewise, the opening of the trunk of Del Bono's car and the use of the evidence found therein, without a search warrant; was also in violation of Marchese's constitutional rights. Even though Marchese was not at any time in the possession or control of the car and even though he denied any connection with or ownership or control over the narcotics found therein, he still had the right to object to such evidence seized by the "special agent Sussman."

Jones v. U. S., 362 U. S. 257.

Where officers have ample time to obtain search warrants, their failure to do so will preclude use of such evidence seized without a search warrant.

Chapman v. U. S., 5 L. Ed. 2d 828;

Taylor v. U. S., 286 U. S. 1;

Johnson v. U. S., 333 U. S. 10.

POINT I(f).

The Evidence Obtained by an Unauthorized Interception of a Telephone Conversation Is in Violation of Title 47, U. S. C. A., Section 605, as Well as in Violation of the Fifth Amendment to the Constitution [Discussion C. T. 39-42].

Sussman purportedly called Marchese at his home or apartment several times and Agent Richards listened in, holding his ear close to the receiver. We submit that this was violative of Title 47, Sec. 605 U. S. C. as to the use of communications.

The Supreme Court in the case of *Rathbun v. U. S.*, 355 U. S. 107, held that when petitioner, who had threatened one Sparks, called the latter and officers listened in on the extension, such was not a violation of the section. However, Justices Douglas and Frankfurter dissenting basing their opinions on *Nardone v. U. S.*, 302 U. S. 385.

A distinction exists between the *Rathbun* case and the one at bar. In the *Rathbun* case, the defendant initiated the call, whereas in the case at bar, the calls were made by Sussman and not by the petitioner.

POINT II(a).

That Portion of Section 2255 of Title 28 U. S. C. Wherein the Right to Petition for a Writ of Habeas Corpus Is Prohibited or Restricted Is Unconstitutional and in Violation of Section 9, Clause 2 of United States Constitution, Which Provides:

> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The last paragraph of Section 2255 of Title 28 U. S. C. provides as follows:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

We submit that this is unconstitutional for it denies to a prisoner the right of habeas corpus arbitrarily if a previous motion was made under said section and denied. The Supreme Court has never passed upon this restrictive provision and it is of the utmost importance to lower courts to have such provision passed on.

In the outstanding case of *United States v. Hayman*, 342 U. S. 205, this Court held that said Section 2255 was not intended to impinge upon the prisoners rights of collateral attack but to minimize the difficulties encountered in applying for a Writ of Habeas Corpus.

This rule was also stated in *Hill v. U. S.*, 368 U. S. 424, where the Court also stated that the section was intended "simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined."

The lower Federal courts have many times held that the trial court does not have to entertain a second motion under Section 2255 and that a Writ of Habeas Corpus under the section is prohibited. This holding clearly impinges on the prisoners' constitutional rights and hence the restrictive provision is unconstitutional under the clause of the Constitution above quoted.

In neither the *Hayman* nor the *Hill* case did the Supreme Court have presented to it, nor did it pass upon the restrictive provision.

In the case of *Price v. Johnson*, 334 U. S. 266, the Court granted the fourth petition for Writ of Habeas Corpus because it contained a new ground. The Court also held that denial of previous petitions was not *res adjudicata.*

In the case of *Heflin v. U. S.*, 358 U. S. 415, the Court held with respect to Section 2255 as follows:

> "'The statute further provided: 'A motion for such relief may be made at any time.' This provision simply means that, as in habeas corpus, there is no statute of limitations, no res adjudicata and that the doctrine of laches is inapplicable."
>
> *Salinger v. Loisel*, 265 U. S. 224;
>
> *Waley v. Johnson*, 316 U. S. 101.

In view of the foregoing, the last paragraph of Section 2255 restricting prisoners' rights to habeas corpus is unconstitutional.

POINT II(b)

The Court Erred in the Denial and Dismissal of the Petition for Lack of Jurisdiction Without a Hearing on the Merits and This Denied Petitioner Due Process of Law in Violation of the Fourteenth Amendment to the Constitution.

The District Court upon the filing of the Return to the Petition for Writ of Habeas Corpus on June 29, 1961, made its order forthwith dismissing the petition without notice to the petitioner and without an opportunity to be heard. The dismissal was solely on the ground of lack of jurisdiction under Section 2255 and hence there was no decision on the merits. This was a denial of due process in violation of the Fourteenth Amendment to the Constitution.

It also violates Section 2255 itself which requires, unless the files and records of the case conclusively show that the prisoner is entitled to no relief, a hearing to determine the issues; and the making findings of facts and conclusions of law. The District Court even in the previous motion under Section 2255 did not have a hearing on the issues or make findings or fact or conclusions of law. Clearly the actions of the District Court were completely lacking in due process.

POINT II(c).

If the Petition Be Considered as a Motion Under Title 28, Section 2255 U. S. C., the Circuit Court Erred in Holding That the Petition Was Defective in That Petitioner Did Not Allege Why He Was Unable or Failed Previously to Assert New Grounds Raised in the Petition or Why He Has Previously Been Unaware of the Significance of Relevant Facts.

The decision of the Circuit Court was directly contrary to the decision of the U. S. Supreme Court in the case of *Price v. Johnson, supra,* which held that it was not necessary; or required of a petitioner set forth affirmatively that he had acquired new information or that he had adequate reasons for not previously alleging new grounds; and that if the Government chooses not to deny the allegation or question its sufficiency, it rests with the Government to show abuse of the process. Even if petitioner had prior knowledge of the facts he would be entitled to amend and the petition should not be dismissed without an opportunity to amend and to make a proper showing at a hearing.

The decision of the Circuit Court was in error in placing the burden on the petitioner to allege in his petition why he failed to assert new grounds previously, in holding his petition defective and refusing to pass on the merits or to permit an amendment and a hearing on such facts.

POINT II(d).

The Circuit Court Erred in Holding That Decisions of the Supreme Court Subsequent to the Original Motion Under Title 28, Section 2255, Cannot Be Considered Under a Writ of Habeas Corpus Even Though Constitutional Rights of Petitioner Are Involved.

Petitioner alleged certain new grounds not covered by his previous motion under Section 2255. These new grounds involved his constitutional rights and were raised partly because later decisions of the U. S. Supreme Court made such grounds valid and substantial, where as before they were overlooked or were considered of no value because of the then status of the law as established by earlier decisions.

The Circuit Court erroneously held that the impact of later decisions of the Supreme Court could not be used as a basis for the new grounds and it cited the case of *Sunal v. Large*, 332 U. S. 174 in holding that new decisions could not be used as a basis of habeas corpus on grounds not urged on appeal. However, the Circuit Court clearly overlooked the exceptions stated in the *Sunal* case namely "where the error does not trench on any constitutional rights of defendants." The Court in the *Sunal* case also stated that there are exceptions to the rule where there are exceptional circumstances.

In this case the constitutional rights of Marchese are involved. There are also exceptional circumstances,

notably that at no time at any stage of any of the proceedings, original, appellate or by collateral attack has there ever been an decision or opinion on the merits. Consequently it can't be determined if any particular ground urged at any time was considered as valid and substantial. Certainly petitioner is entitled to an opinion on the merits of his petition, especially since any order or decision, at least so far as one on a motion under Section 2255 or on petition for writ of habeas corpus is concerned, since the doctrine of *res adjudicata* does not apply to such proceedings.

Conclusion.

In conclusion we respectfully submit that the constitutional rights of the petitioner, especially in connection with the use of the concealed electronic device, were violated. The question of the right to use such devices is being constantly raised in trial courts and should be determined by the Court. Furthermore, the unconstitutionality of the last paragraph of Section 2255 of Title 28 U. S. C. restricting prisoners' rights of habeas corpus has not been passed upon by the Supreme Court and this question is also of vital importance in many cases involving said section in the lower courts. We submit that said restriction is unconstitutional.

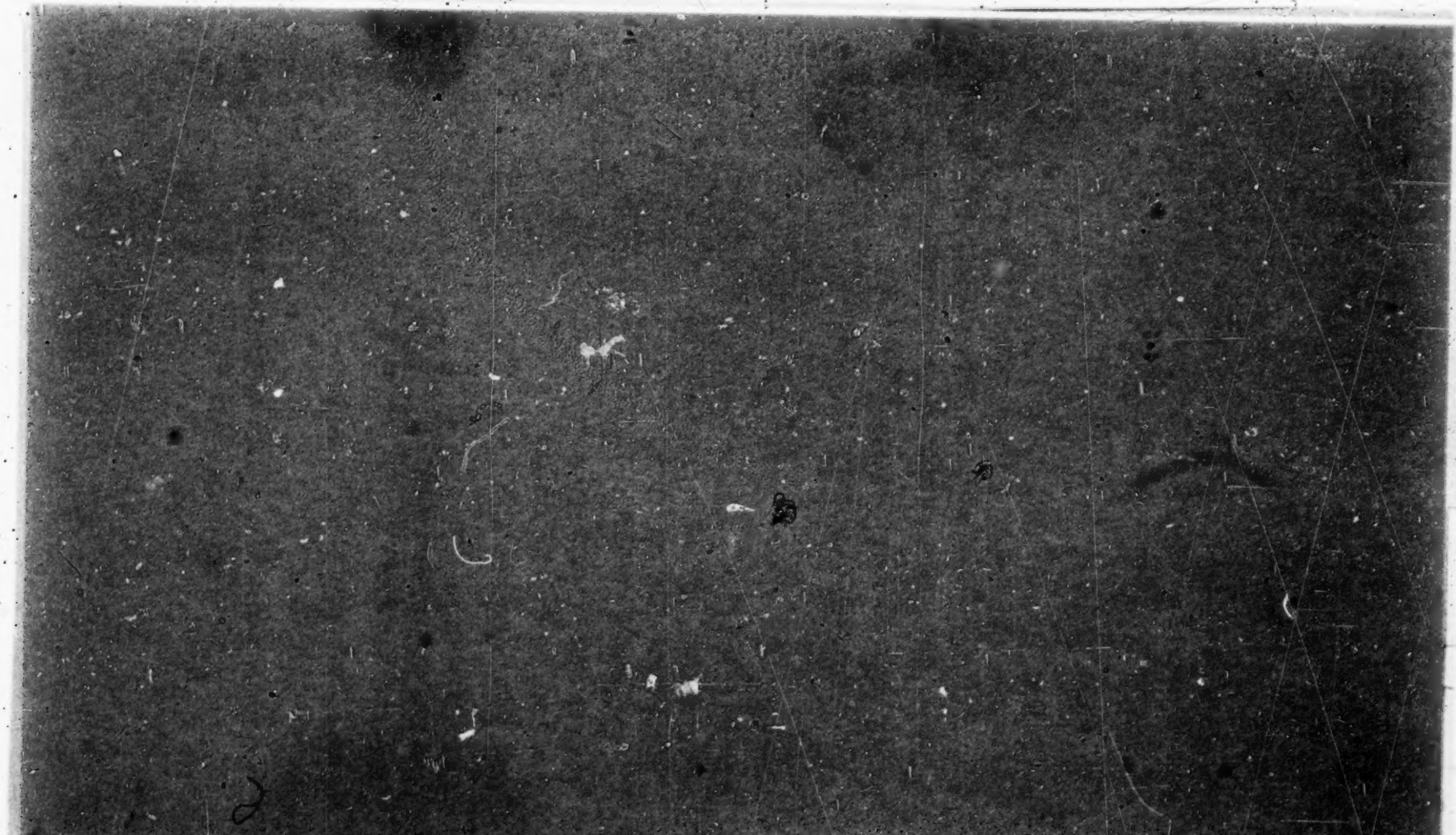
We further submit that petitioner has never been able to obtain a decision or opinion from either the U. S. District Court or the Circuit Court on the merits of the grounds urged by him in his petition for a writ of

habeas corpus and that it is entitled to a decision on the merits of his petition.

We respectfully urge that this Court should grant Certiorari to the end that the judgment and order of the U. S. District Court, and the opinion of the Circuit Court of Appeals affirming the lower court judgment be reversed, and that this Court grant the petition for the Writ of Habeas Corpus.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner Michele Marchese.



APPENDIX A.

Return to Petition for a Writ of Habeas Corpus.

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United States District Court for the Southern District of California, Central Division.

Michele Marchese, Petitioner, v. United States of America, and Preston Smith, Warden of United States Correctional Institution at Terminal Island, California, Respondent. No. 801-61-TC.

Filed June 29, 1961.

COMES NOW the respondent, United States of America, and avers as follows: The Court should dismiss the instant Petition for a Writ of Habeas Corpus

for the reason that the Court is without jurisdiction to entertain said Petition.

Respectfully submitted,

Francis C. Whelan
United States Attorney

Thomas R. Sheridan
Assistant United States Attorney
Chief, Criminal Division

/s/ Wm. Bryan Osborne
Wm. Bryan Osborne
Assistant United States Attorney
Assistant Chief, Criminal Division

APPENDIX B.

Order.

United States District Court, Southern District of California, Central Division.

Michele Marchese, Petitioner, v. United States of America, et al., Defendants. No. 801-61-TC.

Filed June 29, 1961.

An examination of the Petition for Writ of Habeas Corpus in the above matter discloses that after conviction in this court, the conviction was affirmed by the judgment of the United States Court of Appeals for the Ninth Circuit; that thereafter the Petitioner filed a motion under 28 U.S.C. 2255, which motion was denied.

From the face of the Petition, it also appears that the issues presented have been "passed and re-passed upon by the Trial Court."

In view of the foregoing, this Court lacks jurisdiction to entertain the Writ [*Jones v. Squire* (9 Cir. 1952) 195 F. 2d 179], and accordingly the Petition for the Writ is denied, and it is ordered dismissed.

Dated: Los Angeles, California, June 29, 1961.

Pierson M. Hall,
Chief Judge, U. S. District Court.

APPENDIX C.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Michele Marchese, Appellant, vs. United States of America, and Preston Smith, Warden of U. S. Correctional Institution at Terminal Island, California, Appellees. No. 17,480. May 31, 1962.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Jertberg, Circuit Judges, and Davis, District Judge

Davis, District Judge

This is an appeal from an order of the United States District Court, Southern District of California, denying appellant's petition for a writ of habeas corpus. The appeal is made pursuant to 28 USCA §2253.

Appellant was convicted of narcotics violations and sentenced to imprisonment, and is confined within the jurisdiction of the same court. Hence that court is the proper forum for either a motion under 28 USCA §2255, or for a petition for writ of habeas corpus.

After appealing his conviction to this Court, and being denied certiorari by the Supreme Court of the United States, appellant filed in the court which imposed the sentence, a motion under §2255 to annul, vacate and set aside the judgment of conviction. That motion was finally denied March 15, 1961, and no appeal was taken from that order.

On June 20, 1961, the instant habeas corpus action was filed and was dismissed by the District Court for

lack of jurisdiction. The portions of §2255 pertinent to this appeal are:

> "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
>
> "*An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*" (Emphasis supplied).

In the enactment of §2255, ". . . the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum". (Emphasis supplied). *United States vs. Hayman*, 342 U. S. 205, 72 S. Ct. 263, 96 L. Ed. 232.

This viewpoint is even more clearly expressed in *Hill vs. United States*, 368 U. S. 424, 82 S. Ct. 468, wherein the Supreme Court said:

> ". . . Suffice it to say that it conclusively appears from the historic context in which §2255 was

enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined."

Petitioner contends that the provision of §2255 which seeks to limit the use of habeas corpus is violative of Article I, Section 9, Clause 2 of the Constitution of the United States. This court has considered that question numerous times, and is still of the opinion expressed in *Jones vs. Squier*, 195 F. 2d 179 (9th Cir. 1952):

". . . The judgment in the conspiracy and aiding and abetting case shows on its face that the court had jurisdiction of the subject matter and of the person of Jones who appeared and pleaded not guilty. Hence no relief can be afforded Jones under the Great Writ as it stood at the time the Constitution was adopted. Under that Writ the court was confined to the face of the judgment and the process by which jurisdiction over the accused was had for the sole purpose of determining whether the convicting court had jurisdiction of the prosecution and the accused. The court could not even examine the indictment to see if it charged an offense not punishable criminally. See Chief Justice Marshall's opinion for a unanimous court in Ex parte Watkins, 3 Pet. 193, 202, 209, 7 L. Ed. 650, Cf. Frank v. Mangum, 237 U. S. 309, 330, 35 S. Ct. 582, 59 L. Ed. 969.

"It was not until 1867 that Congress created the new forms of relief on matters not appearing in the judgment roll 'in addition' to that previously

available. 14 Stat. 385, 28 U. S. C. §2242 et seq. The determination of these rights has been held not res judicata. Salinger v. Loisel, 265 U. S. 225, 44 S. Ct. 519, 68 L. Ed. 989. It is obvious that since these additional rights were created by Congress, Congress could take them away, or, as here, confine their litigation to the §2255 proceeding."

Petitioner, having failed to appeal from the denial of his motion under §2255, may not now question either the ruling on that motion, or the validity of his sentence, by use of habeas corpus.

Petitioner fares no better if his application for writ of habeas corpus is treated as a second motion under §2255. That statute provides that the sentencing Court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner. Appellant insists in his brief that the third, fourth, fifth and sixth grounds of the habeas corpus application include new questions not advanced in his first §2255 motion. An examination of these claims shows that they are all based upon the fact that decisions of the Supreme Court of the United States subsequent to the original motion under §2255 had raised possible new constructions of some statutes applicable to petitioner's problems. Such matters would not be considered under a writ of habeas corpus prior to the enactment of §2255, and consequently would not be applicable as new grounds under a second motion under §2255. This is clearly established in *Hill vs. United States,* supra, where the court said:

"In *Sunal v. Large,* 332 U. S. 174, the Court held that the remedy of habeas corpus was unavailable in circumstances far more compelling than are pre-

sented here. There the petitioners at their criminal trial had been denied an opportunity to present a defense which subsequent decisions of this court had held should clearly have been available to them. What was said in that is apposite here:

"'We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law. . . . That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal . . . . If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. . . . Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.' 332 U. S., at 181-182."

Even if these may be considered as new grounds, the application fails to set forth the reason why petitioner was previously unable to assert the new grounds, and does not allege that he had previously been unaware of the significance of the relevant facts which is a standard established for consideration of successive motions under §2255. *Sanders vs. United States,* 297 F. 2d 735 (9th Cir. 1961).

It appearing from the foregoing that the application for habeas corpus was defective on its face and contrary to the provisions of §2255, the District Court was correct in holding that it had no jurisdiction to entertain the same, and in ordering that the petition be denied.

This makes it unnecessary to consider the contention of appellant that the court should have permitted him to be personally present at the hearing on the petition, inasmuch as the issue before the court was purely one of law, and did not require the presence of petitioner. Such presence is warranted only where there is required to be determined by the court a question of fact wherein petitioner's own knowledge is involved. *Walker v. Johnson,* 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830; *United States v. Hayman, supra.*

For reasons appearing above, the petitioner's request that this court treat this appeal as an original petition for a writ of habeas corpus is denied.

(Endorsed) Opinion Filed May 31, 1962.

Frank H. Schmid, Clerk.